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IN THE

Supreme Court of the United States

October Term, 1964

No. 796

AWARE, INC., a corporation, and
VINCENT W. HARTNETT,

Petitioners.

v.

JOHN HENRY FAULK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Status of the case

On March 1, 1965, the Court denied the Petition for Certiorari to the New York Court of Appeals filed by Petitioners in this libel case on December 30, 1964.[1]

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(1) The order of the Court read as follows:

"796 — Aware, Inc. v. Faulk. The motions of petitioners for leave to proceed without certifying the record and to dispense with printing the petition for a writ of certiorari are granted. The petition for a writ of certiorari is denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted." As with the Reply Brief of Petitioners filed February 11, 1965, printing of this petition for rehearing has been paid for by counsel for Petitioners as a further contribution to this case, and not by Petitioners, who are appearing as poor persons.

Petitioners claimed that the $550,000 New York libel judgment[2] against them for political statements[3] about the suitability for high union office of a broadcasting entertainer (Respondent), who was an active, elected official of a union enjoying governmentally-delegated powers of compulsion under the NLRA and state law over workers and employers in the New-York-area heart of national broadcasting and over the public, violated their rights of freedom of speech and the press. They argued that Respondent's public powers, as well as his being a compulsory entertainer of the public over the radio public-utility (the airwaves being part of the sovereign property of the United States, like the tidelands), brought him within the "public official" rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964).

They further contended that the "actual malice" test of *Sullivan* and *Garrison* was never met, i.e. knowledge of falsity or awareness of a high degree of probable falsity. They did not knowingly lie. They considered their appeal to be vitally important to everyone's freedom of speech, since few except the richest publishers employing the most

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(2) The trial judge confirmed a verdict of $3,500,000 (the first mega-judgment in defamation) ($1,000,000. compensatory damages against Petitioners [and against a third Defendant who died before the end of the trial and whose estate settled its liability] and $1,250,000. punitive damages against each Petitioner. 35 Misc. 2d 302 (Sup. Ct. N.Y. Co. 1962) (Petition, p. 92)). These were reduced to $550,000. by the Appellate Division ($400,000. compensatory damages, together with $100,000. punitive damages against Hartnett, and $50,000. punitive damages against Aware, Inc.) 19 App. Div. 2d 464 (1st Dept. 1963) (Petition p. 82). Even as reduced to $550,000., this is the largest defamation judgment on record and in the public mind still stands for $3,500,000. *E.g.* Book rev., *Newsweek*, Nov. 16, 1964, p. 105, col. 1. The New York Court of Appeals affirmed without opinion, 14 N.Y. 2d 899 (Petition p. 79), except to state that it had passed on contentions raised under *New York Times Co.* v. *Sullivan*, 14 N.Y. 2d 954 (1964) (Petition, p. 77). Petitioners have contended that Respondent's damage, if any, came not from them but because his involvement in this well-known law suit scared off sponsors.

(3) *I.e.*, that Respondent had been involved with Communist-front activities.

specialized and skilled writers can afford the risk of a huge libel suit, much less damages such as these. Petitioners, who were unpaid and have lost everything as a result of this case, have characterized themselves in the Petition as pamphleteers who acted from patriotic motives.

Respondent limited his brief in opposition, served January 27, 1965, to denying the "public official" argument, asserting that the alleged libel was purely private and that there was deliberate malice (i.e. bad motives), and to stating that the only real question presented was "whether the entire common law right of action for libel should be abolished" (Brief, p. 3).

In this petition for rehearing Petitioners under Rule 58(2) are presenting three independent grounds for rehearing, two (Points I and III) based on intervening circumstances of substantial effect, and one (Point II) based on other substantial grounds available to Petitioners although not previously presented.

I

The nascent conflict between states in the South (or New York in the *Aware* case) and those which follow the spirit of *Sullivan* and *Garrison* has culminated in the Kuchel California criminal libel case brought by a powerful senator against four opponents, which affirms the need to extend the new rule to opinionated pamphleteers as well as mass media.

The intervention of the Kuchel case

In another of the incredible coincidences which have dogged Petitioners during the nine years of this case, the California criminal libel case involving Senator Thomas H. Kuchel was made public on February 18, 1965, during the very week that the Clerk distributed the Petition for Certiorari and other papers in this case to the Court for consideration.

The Kuchel case is an intervening circumstance of substantial effect, because of its possible influence on the Court when it was made public, because it cumulates with this case

to cast a pall of fear over the opinionated, and because it exacerbates the false distinction which Petitioners claim appears to have been made between institutionalized mass media such as newspapers and the individual who pamphleteers. (Since the case involves criminal libel, the morganatic father of civil libel, light shed on one is equally shed on both, the law raised in this Point I reinforcing the argument in independent Point II.)

The Kuchel case and why serious defenses to it make it seem oppressive

Petitioners do not want to try out the Kuchel case (with which they have no connection) but consider it important to point out to the Court why their assault on that case, as one which cumulates with theirs to threaten free speech, is justified.

A copy of the indictment in the case (*People* v. *Capell*, No. 300577, Super. Ct. Los Angeles Co. Calif. Feb. 17, 1965) is set forth as an Appendix.[4] There are four defendants. Two are former policemen; one allegedly in 1964 made an affidavit, which is charged as being libellous, that he had arrested Kuchel one night in 1950 while he was engaged in a low act. A third defendant is a public relations man, and the fourth, Capell, is publisher of the *Herald of Freedom*, an opinionated newsletter which opposes communism and sexual derelictions. The indictment accuses the four of "defaming in writing the honesty, integrity, virtue and reputation" of Senator Kuchel, by circulating the affidavit, which the district attorney's investigation determined to be false.

One may well sympathize with the plight of a distinguished Senator known to be dedicated to his ideals and with a high personal reputation, and ranking among the mighty as minority whip of the Senate, if a deliberately false lie about his behavior is widely circulated among the public. He might do a number of things. He might ignore

(4) The facts on the case in this Point I are taken from the Los Angeles Times, Feb. 18, 1965, p. 1, col. 5; Feb. 19, Part II, p. 1, col. 5; Mar. 4, Part I, p. 2, col. 5; Mar. 5, Part I, p. 2, col. 5; Mar. 7, Sec. B, p. 8, col. 1.

it. He might publicize the district attorney's investigation, either in a news release or in the *Congressional Record*. His position gives him a call on the ear of most of the nation and all of California. He might demand a retraction. He might sue for civil libel. To do what he did do, however, despite the circumstances, in using the discredited remedy of criminal libel, originated to punish treason in the later days of the Court of Star Chamber, should give one the most serious pause. This is the more true when he is one of the most powerful men in the United States and his enemies men of no power at all, and the remedy is usually thought of as a weapon used by men of power against their opponents.

The defendants have available serious law and fact defenses. They may attack the cause of action itself, saying that the absence of a test of intent in criminal libel, so liability is automatic, violates the establishment clause of the first amendment (the same argument made by Petitioners in Point II of this Petition) in establishing a religious concept of sin as the boundary line between defamation and no defamation in the courts. They may also urge *Garrison* to upset the California law which puts on the defendant the burden of proving truth with good motives (Penal Code, Sec. 249) and of rebutting presumed malice (Sec. 250; see *People* v. *Hewlett*, 108 Cal. App. 2d 358, 239 P.2d 150, *cert. denied*, 343 U.S. 981 (1952)). Moreover, although someone did his homework and read *Garrison* (said the complainant: "This case drips with malice." *Newsweek*, March 8, 1965, p.24, col. 1), the prosecution would seem hard put to prove malice under *Garrison* when three of the defendants relied on the affidavit of the fourth, a former policeman, as to official acts he himself performed. The policeman himself, at latest word, had only admitted to doubts about the identification, after being confronted with photos and fingerprints taken after the 1950 arrest. A further defense of law may be made: the defendants may contend that the conduct ascribed to the Senator was not criminal, so that to the extent the indictment (alleging a defaming of his "honesty, integrity") charges that the affi-

davit imputed criminal conduct, there might be no libel to that extent.[5]

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(5) A false charge of crime defames in two ways: it attacks one's honesty as well as virtue. If the crime can be shown as non-existent or unconstitutional (see the following argument), the "honesty" defamation may fall. Cf. *Pollard* v. *Lyon*, 91 U.S. 225 (1875) (error to S. Ct. of D.C.) (a slander case; words held not actionable per se because fornication charged was not indictable offense).

With the application of the establishment clause to the states, it may now be urged that the act (homosexuality) charged in the affidavit is no longer constitutionally criminal. Advanced legal and sociological commentators have long suggested that such conduct in private between consenting adults should be left alone. This is now the view of the 1961 revision of the Illinois Penal Code, the proposed revision of the New York Penal Law and the Model Penal Code. The Wolfenden Report (Report of the Comm. on Homosexual Offenses and Prostitution, Home Office 1957) lists France, Italy, Spain, Belgium, Netherlands, Norway, Sweden and Denmark as treating such conduct as non-criminal; it is still a crime in England but prosecutions have been centralized in the Home Office and have practically ceased.

Such conduct is a crime in California, under CAL. PENAL CODE §§ 286 and 288a, derived by successive reenactments (which looked to the common law, *People* v. *Smith*, 117 Cal. App. 2d 698 (1953); *People* v. *Ragsdale*, 177 Cal. App. 2d, 676 (1960)) from the common-law statutes of 25 Hen. 8,c. 6 (1533) and 5 Eliz. 1, c. 17 (1562). These were taken over directly from the canon law which theretofore solely governed the offense: II Gratian's Decretals, Cause XXXII, Question 7, Canon 13 (1140 A.D.), based on the Law of Holiness given by God to Moses, Leviticus 20:13. For the same reasons suggested with respect to the unconstitutionality under the establishment clause of libel law fictions and presumptions based solely on the recognition of a religious sin jurisdiction and to supplement those reasons (See Point II, *infra*) it is submitted that unless there is a good reason for banning conduct, for a state to treat it as a crime is unconstitutional. All morals or sin are not here being attacked, only those utterly without a basis in reason.

Over the millenia no better reason has been given than that most people do not like the conduct in question, because Moses preached against it; a rationalization is that it threatened procreation among his people. Henry VIII's reception of the crime from the canon law was not based on public policy but was part of his seizure of control of the Church in England and part of a centuries-long process of reception of much of canon law by the common law. By contrast public policy may well have motivated the reception of the canon law of witchcraft. 33 Hen. 8, c. 8 (1541) because witches might threaten the peace. Nor was the canon law interested in public policy: "The function of the ordinary ecclesiastical courts was to punish offenses against religion and morals, in a word to punish sin as such", 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 436 (1883); for the history of this reception, see 2 *id.* 429 *et seq.*

Other defenses can be made. Did the policeman make an honest mistake? Were the photos and fingerprints taken in his presence? Was Capell as a member of the press (though the *Herald of Freedom* is mimeographed) entitled to the privilege of honest mistake under *Sullivan* in publishing allusions to what he probably thought was a scoop? Was he privileged in giving a copy of the affidavit to a Senate sub-committee counsel?

The factors in the case make it seem so out of line with the purifying thrust of *Sullivan* and *Garrison* that its institution appears to flout the authority of this Court.

The effect of the Kuchel case on the Court

Petitioners are fearful that the intervention of another libel case of such prominence and such nasty subject matter while the Petition in this case was being read may have unduly influenced the Court. Petitioners therefore respectfully urge that if there is any basis for their fear, this case be reconsidered now that the initial shock the criminal libel case may have caused has passed.

To the threat to free speech from New York's foot-dragging, and the South's disregarding of the spirit of *Sullivan* and *Garrison*, has now been added California's open flouting of the Court, at a time when other states follow the new spirit

Petitioners pointed out earlier (Petition, pp. 58-9; Reply, pp. 19-20) that the states have been in conflict as to how far to follow *Sullivan* and *Garrison*. Many follow those cases. New York's attitude seems to be that the new rule could not have been meant for it; in other states, as now in California, the issue flips over to malice, as the concurring opinion of Mr. Justice Douglas in *Garrison*, 379 U. S. at 81, feared would happen. (Petitioners are analogizing a conflict of state courts on Bill of Rights questions affecting the states to a conflict of circuits in ordinary federal questions as grounds for a grant for certiorari and for rehearing under Rule 58(2). If the real damage to be done by a case comes when a district attorney in dead earnest puts on a show

trial, it is submitted that the conflict exists at that stage, regardless of what happens when the case gets to the state's highest court.)

When the Petition for Certiorari was being considered the Court may not then have felt that the conflict was serious enough to call for another pronouncement to protect the pamphleteer. Taken alone the *Aware* case may have been considered by the Court (or even by some outspoken liberals or conservatives most likely to be affected) as a sport. It might have been reasoned that it was merely a coincidence that a political libel case should combine the elements of a solvent defendant (whose estate settled his liability), a well-known plaintiff, trial in a politically hostile jurisdiction, famous but irrelevant witnesses, and a jackpot verdict. A twin double is unlikely to recur; if it does, why, there are *Sullivan* and *Garrison*. Other persons with opinions to express, however, have been chilled by the *Aware* case's implications for speech and the press. Yet so far these implications have been treated as fissionable material in too small quantity to reach the critical stage.

The intervention of the Kuchel case, however, which was blazed across the public consciousness, has now put the nuclear mass past the critical stage. Of what concern to lawyers whose appetites have been whetted by *Aware* and *Butts*[6] are *Sullivan* and *Garrison*, when *Aware* is allowed to stand and a state blatantly dusts off *criminal* libel? To even the most "it-can't-happen-to-me" opinionate, the threat is now clear: to the possibility of huge civil damages has now been added the danger of corporal punishment and the disgrace of conviction. The day of political oppression for unpopular views is at hand.

Lawrence Welk and Lenny Bruce (the nice malice of Fleet Street versus the nasty malice of the pamphleteer): you believe what you want to believe

Institutionalized mass media, newspapers like the Laconia Evening Citizen (the newspaper which published the

(6) *Butts* v. *Curtis Pub. Co.* (Petition, p. 55; Reply, p.2 n.2) (verdict $3,060,000.; judgment $460,000.).

libel in *Rosenblatt* v. *Baer, cert. granted,* 33 *U. S. L. Week* 3306 (U. S. Mar. 15, 1965) (No. 780) (see Point III, *infra*)), and the New York Times, and other media such as the Associated Press and the National Broadcasting Company, have an aura of good faith and responsibility about them. Petitioners recognize that they should be protected. The issues they pick are respectable ones: raiding the public till in *Rosenblatt*, excessive police pressure in *Sullivan*, whether General Walker incited a riot in Mississippi in the Associated Press case (Petition, p. 58), or whether the FBI arrested fences selling guns to the Birch Society in the NBC case (Petition, p. 59). (Even in *Garrison* the libel was white-collar: were judges corrupt and too lazy to keep up with their calendar?) *Sullivan's* test of malice is not hard to apply. Even if a reporter believed what he wanted to believe, his honest professional mistake will now relieve a conventional political libel.

What the Kuchel case now emphasizes is the malice problem posed by *Aware*. What about the pamphleteer and the red-meat libel? Is the pamphleteer less socially useful than mass media? Petitioners believed what they wanted to believe, too. Petitioners had substantial backing for their belief that Respondent had participated in communist-front activities. They thought the public should know what they had learned about a powerful man in whom the public had a legitimate interest. He was as booted and spurred with government power to ride on their backs as Jefferson's nobleman. Their fall came when they were not allowed to show what they had relied on and were held to an impossible test of truth. Ought not what they had learned come out? Ought not the accusation in the Kuchel case have come out? The policeman did not make up his accusation. One of the men arrested in 1950 told him he was Kuchel. (Grand jury testimony was that he was from Kuchel's staff.) If the conduct in question can give rise to blackmail, is it not relevant to the discharge of a public official's responsibility? Had the accusation not been made public in 1964, might it not have simmered and perhaps boiled up in worse form later?

Petitioners contend that the pamphleteer performs as valuable a function as institutional mass media. In a day of commonthink, of one-paper cities, of one radio or TV station in some places, a day when only those are heard on mass media who have passed a threshold of acceptability or popularity, the pamphleteer is a source of new political ideas and a means of communication among those who do not conform and otherwise might be alienated from society. (Whether *A Texan Looks at Lyndon*[7], the epitome of the modern political pamphlet, sold seven million copies or only three in 1964, it evidently filled a void left for many by the mass media.)

The cases beginning with *Sullivan* and including *Garrison* (and now *Rosenblatt*) apply the first amendment to mass media. Petitioners ask that it also be applied to the opinionated individual and the pamphleteer.

II

Because the cause of action of libel itself makes liability automatic without permitting proof of intent for no other reason than a continuing respect for the sin jurisdiction of the Church and its courts, it is as much a violation of the establishment clause as prayer in public schools.

As an independent, substantial ground under Rule 58(2) of the Court, Petitioners ask the Court to apply the establishment clause of the first amendment to the law of libel. Petitioners have standing to raise this ground for several reasons. First, Respondent has raised the overall question (Petitioners believe that it was done most seriously) of whether the common-law action of libel should be repealed (Brief, p. 3). Second, Petitioners contend that, the Constitution being a growing thing, the freedom-of-speech clause itself (already before the Court in this case) has in the comparatively a-religious present era sufficient breadth to do the work of the establishment clause as if the estab-

(7) J. Evetts Haley, Palo Duro Press, 1964.

lishment clause were not there. Thus an establishment clause argument is really a freedom-of-speech clause argument; the latter could ban prayer in public schools and irrational rules in libel cases, as well as the former. Therefore Petitioners contend that the argument which follows is properly before the Court.

Far from asking the Court to abolish the common law of libel Petitioners are only asking that it be purified of unconstitutional foreign bodies.

Automatic liability in the law of libel violates the establishment clause of the first amendment

The basis for automatic liability in libel is not logic, it is not public policy, it is not even history; it is religion and it is sin.

A long-standing presumption in the law of libel, both criminal and civil, has been that if written matter is defamatory, a cause of action has been automatically made out. This is true regardless of whether a defense of truth or privilege can be made out. This presumption, making the damage and not the intent the cause of action, has been universally critized: "No branch of the law has been more fertile of litigation than this (whether plaintiffs be more moved by a keen sense of honour, or by the delight of carrying on personal controversies under the protection and with the solemnities of civil justice), nor has any been more perplexed with minute and barren distinctions . . . The law went wrong from the beginning in making the damage and not the insult the cause of action." POLLOCK, TORTS, 243, 249 (13th ed. 1929).

Petitioners contend that the law did not go wrong. It knew very well what it was doing, and what it was doing was recognizing the role of the established religion in punishing the sin of defamation in the canon law courts, which existed side-by-side with the common-law courts.

History of the law

The prevailing view has been that the action of libel, as we now know it, both civil and criminal, originated in a

criminal case, *De Libellis Famosis*, 5 Co. Rep. 125a, 77 Eng. Rep. 250 (Star Ch. 1605), borrowed from the Roman civil law against anonymous written pasquinades or broadsides, enforced by the Court of Star Chamber, and designed to punish sedition in written form (the case involved a verse about the Archbishop of Canterbury[7a]). Since the rule was designed to preserve the ruling oligarchy's power, liability was intentionally automatic, and the only allowable defense was unqualified submission or other proof of loyalty. (Pleading truth would be considered contemptuous conduct.) In time truth with good motives came to be a recognized defense, but the gist of the action remained the same. When the courts extended the wrong to cover private tort actions (to relieve pressures for duelling before the modern police system), it simply carried over its rules for criminal cases. See *Restatement, Torts* § 568(b) (1938).

Yet at the time this was going on, there was a perfectly good remedy *in esse* for defamation available to the common law. The common law might have taken over all defamation from the canon law. It should be recognized that for a thousand years prior to 1600 the law affecting almost all Western Europeans consisted of the canon law of the Church (affecting all conduct of baptized persons) and the temporal law (affecting transactions, breach of the peace and relationships to temporal sovereigns). The temporal law on the continent was the Roman civil law; in England it was the common law. Enforcement was impartial: the bishop's jails were as strong as the king's; his fires killed as well as the king's noose. The two systems were like federal and state law in the United States.

The two systems of temporal and church courts did not live together too happily, but conflict only came at the edges, each respecting the other's basic jurisdiction. The prevailing view of slander affords an example of the relationship. All defamation, spoken or written, being a sin, was cogni-

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(7a) The prelate's overlapping temporal role may explain why the case arose in a temporal court (Star Chamber) instead of the church Court of High Commission or a lower ecclesiastical court.

zable by the Church courts.[8] Only those portions of it which threatened a breach of the king's peace (a sort of commerce clause of its day) could originally be tried in England in the King's courts of common law.[9] Those slanders which were thus temporally cognizable have come down as actionable per se to the present: imputation of crime, loathsome disease, business misconduct, and unchastity.

Although the Reformation in England continued the church law and church courts' separate jurisdiction until 1640, when the power to inflict corporal punishment was practically removed though the courts still retained much of their power, the transfer of jurisdiction over offenses went on more quickly until all slander where there is any pecuniary damage is now actionable. But what about the rest of defamation, insults not causing money damage which might cause the loss of friends, or mental distress, or illness? What about the canon law rule on writings? Why was much of defamation left in the church courts, where it still exists in limbo (in England the church courts lost their jurisdiction only in 1855, 18 & 19 Vict., c. 41). Why did the common-law courts borrow from the law of treason when they came to provide a civil remedy for written defamation?

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(8) II Gratian's Decretals, Cause V, Question I, Canons 1 and 2 (1140 A.D.).

(9) Local manorial and shire courts had once handled both written and verbal defamation, but not the king's courts, so that once the church courts took over all defamation and the local courts decayed, the king's judges had to use fictions to be able to punish defamation at all. 1 Pollock and Maitland, *History of the English Law* 130; 2 *id.* 538 (2d ed. 1911). The true view of defamation, therefore, is that there is an overall common-law action for defamation, with proper rules in harmony with those of other crimes and torts, but it has been in a state of suspended animation for a long time because of the establishment of a sin jurisdiction which American courts still unconstitutionally recognize. A proper common-law action for defamation would require proof not only of a false written or verbal statement, but also proof by the complainant that there was also intent to lie. It is this latter ingredient whose absence is harmful to defendants; the obstacle to requiring such an ingredient today is the insistence of courts on honoring statutory or present-day common-law views which perpetuate the notion that a portion of defamation is in the cognizance of religion and the courts cannot invade religion's province.

The answer is that the common-law courts and lawyers of the period had a healthy respect for both the church courts and their preachings on sin. Englishmen's lives were permeated with religion. For the common-law courts there would be no question of infringing on the province of the divines, by taking over full jurisdiction over verbal or written defamation. Instead, their respect for the church and their own beliefs brought them to conjure up fictions (i.e., temporal damage in verbal, and automatic liability carried over from criminal libel, in written defamation). By 1812 in England, Sir James Mansfield, who had no establishment clause to bother him but who no doubt respected the established church, decided that the rules were too well established to change. *Thorley* v. *Lord Kerry*, 4 Taunt. 355, 128 Eng. Rep. 367 (Ex. Ch. 1812).

The problem today

Thus today, instead of a pure remedy in either civil or criminal defamation, in which a cause of action can be made out only if intentional or negligent misconduct is proved, the concept of sin has produced a situation which baffles courts and lawyers and in this case has worked a terrible wrong on petitioners. (Petitioners were never allowed to show their intention, they were hobbled in showing reliance on others: they were held to an absolute liability and in proceedings resembling those of the later days of the Star Chamber were held to an impossible test of truth.)

Is such deep-freezing of sin an establishment of religion in violation of the First Amendment? Petitioners contend that it is. Religion is not limited to devotion and prayer. Religion has always sought to govern all kinds of conduct.[10] Where there is no reason other than a religious one for a particular proscription, it is submitted that continuation of such a proscription is as much an establishment of religion as forcing a prayer on school children. Ninety percent of the people may want to continue prayer in the schools:

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(10) One may see a recent temporal example in the meeting of churchmen in Washington, D. C on March 14, 1965, to urge the dispatch of Federal troops to Selma, Ala., to compel faster voter registration. N. Y. Times, March 15, 1965, p. 1, col. 8.

ninety percent may want automatic liability in defamation, yet without a rational basis, each amounts to an establishment of religion, by imposing either devotion or a concept of sinfulness. What need have bishops to fill their cathedrals to teach conduct demanded by the Bible, when the law does it for them? The Church of England is in fact established in the courts of America.

This argument is in no way in conflict with the Court's opinion in *School District of Abington* v. *Schempp*, 374 U.S. 203, 303 (1963): "the 'Establishment' clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions," (or "activities which, though religious in origin, have ceased to have religious meaning"). What petitioners contend is that where the only reason for a proscription is a religious one, and there has been no intervening rational or public policy basis for it (automatic liability in defamation has never had a nice word said about it), the views of a religion, or to put it more bluntly the views of some people, are being inflicted on all. Not only is it a violation of the establishment clause, but it is a violation of the "freedom-of-speech" clause as well, since one man's establishment is a limitation of another's freedom of speech.

If Petitioners are right in their contention that the establishment (or freedom-of-speech) clause can excise the automatic liability rule of the defamation cause-of-action, the Court need not go on cutting Gordian knots.[11] Instead it will have achieved the Nirvana of commentators on the law of defamation: the absurdities of centuries will go, the law of defamation will be free to grow naturally, and in defamation as in other crimes and torts intent will be the gist of the cause of action.

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(11) What *Sullivan* and *Garrison* did for political libel the establishment clause can do for the rest of defamation. With defamation freed of its irrational matrices, it can grow naturally; the state courts will be free to fashion the remedy so as to be fair to defamer and defamed alike. Even in non-damage cases the courts might be able to compel publication of apologies and retractions. This would reduce the pressure on the Court to right ghastly wrongs such as *Sullivan* and *Aware*.

III

A further intervening circumstance of substantial effect is the grant of certiorari on March 15, 1965 in *Rosenblatt* v. *Baer*, raising the issue whether a titular public employee (recreation area supervisor) is within the scope of "public official" under *Sullivan* and *Garrison*, but leaving open the issue whether a non-titular quasi-public official exercising federally-delegated NLRA union powers is included.

Should the Court decide in *Rosenblatt* v. *Baer*, *cert. granted*, 33 U.S.L. WEEK 3306 (U.S. Mar. 15, 1965) (No. 780) that respondent in that case, Baer's, employment as supervisor of a ski-resort recreation area made him a "public official", it would seem to be placing form over substance, if at the same time Respondent union-official in this case, with his NLRA-delegated powers and compulsory public-utility relationship with the public as a broadcaster, is not considered a "public official".

Scope of "public official"; the "title" argument

The fact is that almost any group of citizens in some states can set up a state-chartered district for almost any purpose. The newspapers are full of a story of how real estate promoters in California got a family with a large farm to set up a local improvement district which then floated $500,000 of bonds in Wall Street to put in roads and sewers. (So far no lots have been sold and the interest is in default.) There are other stories of people setting up what amounts to their own country club as a public improvement district.

Petitioners do not oppose such extension of public activities. It would seem, however, to carry the notion of "public official" to an extreme, if his title, the geographic scope of his powers, and an almost fictitious connection with government is the test of whether he may be criticized with impunity under *Sullivan* and *Garrison*, and not the substance of his actual powers. There is little difference be-

tween the public "recreation area" ski-resort in *Rosenblatt* and a private ski-resort, whether non-profit, profit-making or even money-losing. Whether public or private, it provides a good salary for someone and business for local merchants. A private ski-resort whose owner wishes to retire might even be sold to a new "recreation area" so that local merchants will continue to have good business.

The "delegated powers" argument; a "non-geographical" test

By contrast, Mr. Hoffa, whose NLRA-empowered Teamsters Union has 1.4 million members, or Mr. McDonald (or Mr. Abel) whose Steel Worker's Union has six hundred thousand members, or Messrs. Huntley and Brinkley, who are enabled by a government public-utility to monopolize a radio or television channel, though their powers are nationwide, may not be criticized with like impunity, if form and not substance is to govern.

Petitioners submit that Respondent's delegated NLRA powers as AFTRA Vice President, powers over the national heart of radio and television out of all proportion to the AFTRA Union's 4,000 members, clearly bring him within the *Sullivan* and *Garrison* rules. Moreover, his role as a regular broadcaster over the governmentally-imposed radio monopoly gave him even more compulsory powers over the public whose air waves he legally pre-empted for his own profit. His public powers (nationwide in scope) were many times greater than Baer's as supervisor of a public ski-resort in the *Rosenblatt* case.

Petitioners see little difference in the malice aspects of the case. (The Appellate Division was morally righteous in tone, while the New Hampshire court was clinical, but that is the difference between Sarah Bernhardt and Eleanora Duse, or David Susskind and Edward R. Murrow.) The petitioner in *Rosenblatt* seems to have been a cantankerous, unpaid newspaper man (with warm friends and annoyed enemies) who was warring for his conception of the public good, whether it meant his victim would lose his public job or not. His words probably reached a far higher proportion of the people who might employ the

ex-supervisor than did Petitioners' through the *Aware News Supplement.*

For the Court now to extend *Sullivan* to other nominally public officials, yet leave open or in conflict the question of extending it to those holding non-geographical government power through delegation, or to those granted monopoly powers under a public-utility law, would seem to leave unsettled a large area of free speech. With the pervasive growth of the public sector geographically (to include even a ski-resort) as well as non-geographically, the need of the public to know how far its speech on public matters may go is great. To delay a pronouncement in face of the continuing acceleration in growth of the public sector is to leave a pall of fear over the public as a whole and especially that political faction whose views happen at any given moment to be out of fashion.

Petitioners suggest that the Court has before it the two logical directions for extending *Sullivan* and *Garrison: Rosenblatt* v. *Baer* deals with the person who, regardless of how little his powers are, is by title a public official; Petitioners' case deals with the person who regardless of his title wields very substantial powers delegated by government. For the Court to decide one without the other is to leave a void as great as the one it fills.

CONCLUSION

For the reasons set forth herein Petitioners respectfully urge that this Petition for Rehearing and the Petition for Certiorari be granted.

Respectfully submitted,

Dated: March 25, 1965

HENRY S. MIDDENDORF, JR.,
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APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

FRANCIS A. CAPELL, JACK CLEMMONS, JOHN F. FERGUS, and NORMAN H. KRAUSE,
Defendants.

S. C. No. 300577
D. A. No.

INDICTMENT

CONSPIRACY TO VIOLATE SECTION 248, SECTION 650 1/2, and SECTION 182, SUBD. 1, PENAL CODE

The Grand Jury of the County of Los Angeles, State of California, hereby accuses FRANCIS A. CAPELL, JACK CLEMMONS, JOHN F. FERGUS, and NORMAN H. KRAUSE of a felony, namely, CONSPIRACY TO VIOLATE SECTION 248 and SECTION 650 1/2 and SECTION 182, Subdivision 1, of the Penal Code of the State of California, which said conspiracy is in violation of Section 182 of said Penal Code, in that on or about and in the month of May, 1964, and continuously thereafter, to and including the 17th day of February, 1965, the above named defendants, together with other persons whose true names are unknown to the Grand Jury, did, at and in the County of Los Angeles, State of California, wilfully, corruptly, and feloniously conspire, combine, confederate, and agree together and with said other persons to

First, maliciously defame by and in writing the honesty, integrity, virtue, and reputation of United States Senator Thomas H. Kuchel and did thereby expose said United States Senator Thomas H. Kuchel to public hatred, contempt, and ridicule, in Violation of Section 248 of the Penal Code of the State of California;

Second, use the name of United States Senator Thomas H. Kuchel wilfully and wrongfully in a manner that will and did affect and did have a tendency to affect his moral repu-

tation generally and in the estimation of the person and persons to whom it was so used, in Violation of Section 650 1/2 of the Penal Code of the State of California;

And further that said defendants, FRANCIS A. CAPELL, JACK CLEMMONS, JOHN FERGUS, and NORMAN H. KRAUSE, and other persons whose true names are unknown to the Grand Jury, did by themselves individually, and with the others in fact maliciously defame, by writing, the honesty, integrity, virtue, and reputation of United States Senator Thomas H. Kuchel, and did thereby expose United States Senator Thomas H. Kuchel to public hatred, contempt, and ridicule in Violation of Section 248 of the Penal Code of the State of California.

And further that said defendants, FRANCIS A. CAPELL, JACK CLEMMONS, JOHN FERGUS, and NORMAN H. KRAUSE, individually, and with others did wilfully and wrongfully use the name of United States Senator Thomas H. Kuchel in a manner that will and did affect and did have a tendency to affect his moral reputation generally, and in the estimation of the person and persons to whom it was so used, in Violation of Section 650 1/2 of the Penal Code of the State of California.

Pursuant to said combination, confederacy, agreement, and conspiracy to carry out the objects and purposes of the same, the following overt acts occurred in the County of Los Angeles, State of California:

OVERT ACT No. 1 — On or about the 15th day of May 1964 there occurred a conversation between the defendants NORMAN H. KRAUSE, JOHN F. FERGUS, JACK CLEMMONS, and FRANCIS A. CAPELL.

OVERT ACT No. 2 — On or about the 25th day of May 1964 there occurred a conversation between the defendants NORMAN H. KRAUSE, JOHN F. FERGUS, JACK CLEMMONS, and FRANCIS A. CAPELL.

OVERT ACT No. 3 — On or about the 3rd day of June 1964 there occurred a conversation in the presence of Amy N. Robertson by the defendants NORMAN H. KRAUSE and FRANCIS A. CAPELL.

OVERT ACT No. 4 — On or about June 3, 1964, the defendant NORMAN H. KRAUSE, at the request of the defendant JOHN F. FERGUS, did sign an affidavit which was notarized in the presence of Amy N. Robertson, and said notarized affidavit was taken into the possession of defendant JOHN F. FERGUS.

OVERT ACT No. 5 — On or about September 15, 1964, there occurred a conversation by defendants FRANCIS A. CAPELL and JOHN F. FERGUS with one John Dickey.

OVERT ACT No. 6 — On or about September 15, 1964, the defendants FRANCIS A. CAPELL and JOHN F. FERGUS did deliver a certain affidavit to one John Dickey.

OVERT ACT No. 7 — Some time following the date of June 3, 1964, and on or about June 15, 1964, said defendant JOHN F. FERGUS did send the affidavit of June 3, 1964, executed by defendant NORMAN H. KRAUSE, to the defendant FRANCIS A. CAPELL.

[*Witnesses, Certification and Filing Data omitted*]

CERTIFICATE OF COUNSEL UNDER RULE 58(2)

The undersigned, Counsel for Petitioners, does hereby certify that this Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58(2).

Dated: March 25, 1965

HENRY S. MIDDENDORF, JR.,
Counsel.